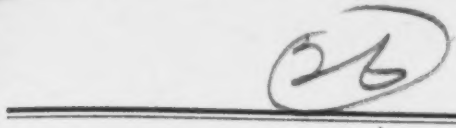

Supreme Court of the United States

October Term, 1944

No. 1197

MIAMI BRIDGE COMPANY - - - - Petitioner,

versus

RAILROAD COMMISSION OF THE STATE OF FLORIDA - - - - - Respondent.

RESPONDENT'S BRIEF OPPOSING WRIT OF CERTIORARI

LEWIS W. PETTEWAY,
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R. W. ERVIN, Jr.,
Of Counsel.

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RAILROAD COMMISSION OF THE STATE OF FLORIDA - - - - - - - - - - *Respondent.*

RESPONDENT'S BRIEF

OPPOSING

WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

1. The opinion of the Supreme Court of Florida, review of which is sought in this proceeding, is correctly referred to in Petitioner's brief filed in support of its petition. While the opinion has not been published in the official reports, nevertheless it may be found in Volume 4, Page 356, of the advance sheets of Volume 20 of the second series of Southern Reporter, dated February 8, 1945.

JURISDICTION

While petitioner's brief does not so state, it is apparent that jurisdiction of this Court is invoked by petitioner under Section 237 of the Judicial Code as amended (28 U. S. C., Section 34 (b)).

The foregoing statute is the only authority for taking a case to the Federal Supreme Court from the highest court of a state, and the right to review the decision of a state court exists only in cases strictly within its terms.

Caperton v. Ballard, 14 Wall. 238, 20 L. E. 885;

Gorman v. Washington University, 62 S. Ct. 962, 86 L. Ed. 1300.

The burden is upon petitioners to show affirmatively that the United States Supreme Court has jurisdiction.

Memphis Natural Gas Co. v. Beeler, 62 S. Ct. 857, 86 L. Ed. 1090.

We respectfully submit that it affirmatively appears that this court does not have jurisdicition to review the foregoing decisions of the Supreme Court of Florida by writ of certiorari because:

(A) **It affirmatievly appears that the sole question involved is the construction of a state statute which does not in any way involve the application of the Federal Constitution.**

(B) **It does not affirmatively appear that any Federal statute, ground, question, right or title is involved.**

ARGUMENT

(A) It affirmatively appears that the sole question involved is the construction of a state statute which does not in any way involve the application of the Federal Constitution.

The statute involved in this proceeding is Chapter 21743, Laws of Florida, Acts of 1943, which amended Section 347.08, Florida Statutes, 1941.

Prior to the enactment of the aforesaid amendatory act, respondent had jurisdiction over all toll bridges or causeways in the State of Florida which, including the approaches thereto, were more than three and one half (3½) miles in length.

The purpose of the 1943 amendatory act, aforesaid, was to place all toll bridges or causeways, regardless of length, under the jurisdiction of respondent, with certain specific exceptions.

In the State Court petitioner took the position, among others, that its toll bridge, the "Venetian Causeway", came within the provisions of the stated exceptions. The State Court held adversely to petitioner's position. Although other questions were raised by petitioner, this was the only real question involved and concerned merely the construction of the State statute.

In this court petitioner takes the position that the 1943 amendatory act is violative of the Federal Constitution in that

(1) It deprives the petitioner of *vested rights* without consideration and without due process of law, and

(2) It impairs the obligation of a judicially validated contract.

Of what *vested rights* does petitioner claim it would be deprived?

This question is answered on page 19 of petitioner's brief in the following words:

> "This would necessarily deprive the owners of the bridge (petitioner), if the act was intended to apply and did apply to the Venetian Causeway, of the right to regulate and fix tolls, charges, uses, and hours for keeping open, . . ."

Thus the *vested right* of which petitioner fears it will be deprived is *the right to fix the rate of tolls and charges* and the hours for keeping its bridge open for use by the public.

Such powers, however, cannot be vested rights in the State of Florida. The Constitution of the State of Florida, Section 30 of Article 16, provides:

> "The Legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, *or performing other services of a public nature;* and shall provide for enforcing such laws by adequate penalties or forfeiture."

This constitutional provision authorizes statutory regulation of all those engaged in rendering intrastate service of a public nature—the public service subjects to be regulated and the nature, extent and method of the regulation

being for legislative determination within organic limitations.

Gainesville Gas, Etc. Co. vs. Gainesville; 63 Fla. 425; 58 So. 785.

Southern Utilities Company vs. Palatka; 86 Fla. 583; 99 So. 236.

Affirmed in 268 U. S. 232.

45 Sup. Court 488; 69 L. Ed. 930.

Perhaps the most outstanding Florida case on this precise question is City of Tampa vs. Tampa Waterworks Co., 45 Fla. 600; 34 So. 631—affirmed in 199 U. S. 241; 26 Sup. Ct. 23. The following quotation from the opinion in that case leaves little room for doubt as to the inability of the legislature to contract away its power to regulate a public service for the public good:

> "The power mentioned in this Section (Section 30, Article XVI) is full power; a continuing, ever present power. Being irrevocably vested by this section, the legislature cannot divest itself of it. Neither can it bind itself by contract, nor authorize a municipality—one of its creatures—to bind it by contract, so as to preclude the exercise of this power whenever in its judgment the public exigencies demand its exercise. Full power cannot exist, if by contract that power can be curtailed or impaired. Without this section the power to regulate rates would exist under the general grant of legislative power in Section 1, Article III, but such power could be surrendered by a contract made by the State or by a municipality by its au-

thority. *With this section in force the power to surrender by contract the right to regulate rates is taken away,* for the authority to surrender cannot co-exist with the ever present continuing power to regulate, which is declared by this section to exist in the legislature. The section in question does not operate to prevent the legislature from making contracts itself, nor from authorizing municipalities to make them and in and by such contracts stipulating for certain rates which will be valid and binding obligations so long as the legisture does not exercise or authorize municipalities to exercise the power to prevent excessive charges which is declared by the section to be vested in the legislature. *But every charter granted and every contract made by the legislature, or by a municipality under its authority, are accepted and made subject to and in contemplation of the possibility of the subsequent exercise of the power to prevent excessive charges which by this section is unalterably and irrevocably vested in the legislature.* The section not only becomes a part of every such contract, as much as if written therein, but by implication it denies the authority of the legislature to bind itself by a contract of its own making, or one made by a municipality under its authorization, not to exercise the power thereby recognized whenever in its wisdom it should think necessary so to do. (Pgs. 626-627).

The case of Public Service Commission vs. Harpers Ferry & Potomac Bridge Company, 114 W. Va. 291; 171 S. E. 760—Certiorari Denied—54 Sup. Court 628; 78 L. Ed. 1479, is strikingly similar to the case at bar. In that case

the Harpers Ferry & Potomoc Bridge Company operated a highway toll bridge extending across the Potomoc River from West Virginia to Maryland under Acts of the Assembly of Maryland and the Legislature of Virginia in which there was fixed the rate to be charged for the use of said bridge. The Public Service Commission of West Virginia brought an action to compel the Bridge Company to file with the Commission a schedule of the tolls charged traffic crossing said bridge from West Virginia. The Bridge Company defended the action on several grounds; one of which was that the original Acts of the respective Assemblies of Virginia and Maryland constituted a contract between the two States and the operators of said toll bridge, the obligations of which neither state could impair because of Article I, Section 10 of the Federal Constitution. This was their third contention. Their fourth contention was that the right of the operators to charge tolls was a property right of which they could not be deprived in whole or part without due process of law under the provisions of the Federal Constitution.

The Court's ruling on these two propositions is found in the following quotation from the opinion in that case:

> "The third proposition of the bridge company is refuted by our case of Laurel Fork, etc. Rd. Co. v. Transportation Co., 25 W.Va. 324. It was held there that, whenever private property was devoted to public use, the owner in effect granted the public an interest in such use, and he must to the extent of that interest submit to legislative control for the common good. That doctrine was pronounced by Lord Chief Justice Hale nearly three centuries ago, and it was traced in the Laurel Fork decision

from Lord Hale through English and State cases to Munn v. Illinois, 94 U. S. 113; 24 L. Ed. 77, where it was approved by the Supreme Court of the United States. * * * * Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

"The fourth proposition advanced by the bridge company is abstractly sound. But the regulation of a public utility is 'a valid exercise' of the police power of a state. Union Dry Goods Co. v. Georgia, etc., 248 U. S. 372; 39 Sup. Ct. 117; 63 L. Ed. 309; 9 A. L. R. 1420. It is settled that 'neither the "contract" clause nor the "due process" clause (of the Federal Constitution) has the effect of over-riding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the Community'. Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558; 34 S. Ct. 364, 368; 58 L. Ed. 721." (Pgs. 761-762—171 S. E.)

This identical question was also passed upon by the Supreme Court of California in the case of American Toll Bridge Company v. Railroad Commission, 83 P. 2d 1. In this case a franchise to construct and operate a toll bridge had been granted to the American Toll Bridge Company. At the time of granting of the franchise, the power to regulate the companies operating the bridges was vested in the County Commissioners under the laws of California. The franchise was granted in 1923 and the Legislature of California in 1927 passed a law transferring the jurisdic-

tion of toll bridges to the Railroad Commission. Shortly thereafter the Commission instituted a proceeding to inquire as to the fairness of the tolls charged by the bridge company and, after hearings, entered an order substantially reducing the tolls. In the franchise granted by the commissioiners was a provision which required the commissioners, in fixing tolls, not to raise the tolls to the extent where the revenue thus produced would produce annually an income exceeding 15% of the actual cost of the construction or erection and maintenance of the bridge. The bridge company in that case made the same contention that the petitioner is making here, that is, that this statute, containing the maximum at which its rates could be fixed, constituted a contract. Yet the court held that the bridge company did not have a vested right to have its tolls fixed by the County Commissioners and that the limitation of the amount which could be charged for tolls in the statute did not constitute a contract between it and the State. In this case the Court said:

> "The petitioner construes the provisions of the foregoing sections, read together, as securing it against a reduction of the tolls during the specified period unless its net annual revenue exceeds fifteen per cent of the fair cash value. It may fairly be assumed from the evidence that the income in any year, after all deductions, has not equalled the designated fifteen per cent. Merit in the petitioner's contention depends, however, on the propriety of reading into the language of the sections an intent on the part of the legislature to declare that receipts from tolls which return a net annual income of fifteen per cent 'is not disproportionate' to the 'fair cash value', and that it intended to en-

courage the investment of funds by guaranteeing such a return. This construction, however, fails to give such import to the language of the section which prohibits either an increase or a reduction in the tolls unless the receipts are shown to be disproportionate. The language contemplates increases as well as reductions at any time the disproportion is shown to exist, limited by the fifteen per cent maximum. Such language is inconsistent with any intent to enter into a contract that a fifteen per cent return will be assured to the grantee of the franchise, if the toll rate established produced that much. Rather it is to be assumed that the legislature intended, not only to afford an adequate and proportionate return to the grantee, but that it also intended some measure of protection to the public's right to be charged not more than a reasonable toll for the use of the bridge. Toll bridges in this state have been subject to legislative control since 1854. Newsom v. Board of Supervisors, 205 Cal. 262, 266, 270 P. 676. In 1872, when section 2846 was enacted by the legislature, sufficient scope was allowed between both interests, public and private, to permit adequate elasticity in the exercise of the legislative rate-making function in the light of prevailing economic conditions. Such a statute does not savor of a contract obligation to the grantee. Its object was to delegate to and vest in the designated body the power to regulate tolls as circumscribed by the stated limitation. The courts have recognized that this was, and that the creation of a contract obligation was not, the purpose and object of such

statutes. Of a statutory provision permitting participation in the rate-making function by two representatives on the board of commissioners of the Spring Valley Water Company selected at the time of incorporation (later changed by section 1, article 14 of the Constitution vesting the rate-making power in the board of supervisors), it was said: 'These things are not of the contract; they appertain to the sovereignty of the state, and can not be bargained away,' citing Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77."

This case was upheld by the Supreme Court of the United States in the case of American Toll Bridge Company v. Railroad Commission of the State of California, 307 U. S. 486, 59 S. Ct. 948, 83 L. Ed. 1414-20.

From the foregoing it conclusively appears, we submit, that petitioner has no vested right in the fixing of tolls and charges for the use of its toll bridge nor does it have any vested right in determining the hours such public utility may be used by the public.

Petitioner's second contention is that the amendatory act of 1943 impairs the validity of a judicially validated contract, which contract, the petitioner contends, gives it the right to fix and regulate toll charges, uses and hours for keeping its bridge open for traffic.

We respectfully submit that this contention is fully answered by our preceding argument.

(B) It does not affirmatively appear that any Federal statute, ground, question, right or title is involved.

The Supreme Court has no jurisdiction to review a state court's decision unless it appears affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the Federal question was necessary to a determination of the cause, that the Federal question was actually decided, or that judgment as rendered could not have been given without deciding it.

Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S. Ct. 528, 303 U. S. 206, 82 L. Ed. 751.

In view of the fact as developed by our argument herein that petitioner can have no vested right to fix the rate of tolls or charges for the use of its public utility by the public, and in view of the further fact that all contracts concerning the fixing of rates and charges for the use of a public utility is subject to the paramount right of the legislature to alter such rates, we respectfully submit that the petitioner has failed to affirmatively show in its petition and supporting brief that this Court has jurisdiction of this cause.

CONCLUSION

We respectfully submit that the petition should be denied because:

(1) It affirmatively appears that the sole question involved is the construction of a state statute which does not in any way involve the application of the Federal Constitution.

(2) It does not affirmatively appear that any Federal statute, ground, question, right or title is involved.

(3) A Federal right is assumed where none exists.

Respectfully submitted,

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